U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 14 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 CFR 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Stepard

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 CFR 204.5(h)(2).

The petitioner is a university medical school which seeks to employ the beneficiary as a research assistant professor. At the time of filing, the petitioner employed the beneficiary as a research associate.

The specific requirements for supporting documents to establish that an alien has achieved sustained national or international acclaim are set forth in Service regulations at 8 C.F.R. 204.5(h)(3):

> Initial evidence: A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Rather than addressing the above criteria, counsel divides the exhibits in the petitioner's initial submission into seven categories: (1) personal recommendations; (2) research proposals; (3) evidence of award of research fellowship; (4) accomplishments of petitioning university; (5) biographical sketches of personal references; (6) articles and abstracts; (7) significance of publishing articles and journals.

All of the "personal recommendations" come from faculty members of the petitioning university and of McGill University, where the beneficiary had earned his Ph.D. in 2000. These letters are

not first-hand evidence that the beneficiary has earned sustained acclaim outside of those two universities. By statute and regulation, the classification sought requires documentary evidence of sustained national or international acclaim, and the petitioner cannot arbitrarily replace such evidence with attestations from the beneficiary's associates and superiors, who assert that they find the beneficiary's abilities to be extraordinary. Similarly, witness statements to the effect that the beneficiary is "well known in the field" have little evidentiary value without objective evidence from independent sources. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Professor Elliott J. Roth, chairman of the petitioner's Department of Physical Medicine and Rehabilitation, describes the beneficiary's work:

> [The beneficiary] has control of a 150 square foot laboratory, which is used for his studies on spasticity. In this setting, his skills as an engineer, and his experience and insight into special problems of spinal cord injury and stroke are very important to the studies being undertaken at the medical school. . . .
>
> [The beneficiary] currently focuses his research on the application of the sophisticated engineering methods . . . to understand the impairments in spinal cord injury and stroke in adult humans. His methods are of enormous value in helping understand origins and mechanisms of the severe impairments that result [from] spinal cord injury, and they form an important foundation for evaluating other treatment, such as electrical stimulation, pharmacologic treatments and physical therapy.

Prof. Roth adds that the beneficiary "has applied for grants to fund his research," without indicating that the beneficiary had actually received any grant funding. Letters from other faculty members of the petitioning university are fundamentally similar to Prof. Roth's letter.

Professor Robert Kearney, chair of the Department of Biomedical Engineering at McGill University and supervisor of the beneficiary's doctoral studies there, states:

> [The beneficiary's] Ph.D. research program had two main aims:
>
> 1. To characterize the mechanical abnormalities present in spastic Spinal Cord Injured (SCI) patients and
> 2. To explore the therapeutic and functional effects of Functional Electrical Stimulation (FES) assisted walking on these abnormalities.
>
> In his thesis work [the beneficiary] used a new parallel-cascade system identification method to quantify joint dynamic stiffness and to distinguish the relative contributions of intrinsic and reflex mechanisms to it. His work demonstrated that:
>
> 1. Overall joint stiffness is substantially greater in spastic SCI patients [and] that this is due in large part to increased reflex contributions. This

represents a major contribution to our understanding of the nature and etiology of this disorder.

2. Long-term use of Functional Electrical Stimulation (FES) to assist walking resulted in a substantial reduction in the abnormalities in stiffness and reflex function. This indicates that FES, originally designed to facilitate locomotion, may be useful as a treatment for spasticity.

In total [the beneficiary's] Ph.D. work provides the best objective, quantitative description of the properties of the spastic joint yet achieved. It provides the foundation for the development of the objective, quantitative methods for evaluation of hypertonia.

Other McGill faculty members discuss the above projects in their letters, generally in terms of the direction future research will take, and the promise that the beneficiary's work holds for the future, rather than in terms of any widespread impact that the beneficiary's work has already had.

Regarding the beneficiary's published work, the record shows one article that had actually been published as of the petition's filing date. Other articles are identified as in press or in various stages of preparation, but these articles were at the time unpublished. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

The director informed the petitioner that the initial submission was not sufficient to establish that the beneficiary is nationally or internationally acclaimed as a researcher at the very top of his field. The director specified the ten criteria set forth at 8 CFR 204.5(h)(3), and stated that the petitioner had met "the criterion regarding authorship."

In response to the notice, counsel states "[a] group of evidence that establishes that the [beneficiary] satisfies of the extraordinary ability level is the grant proposals filed by the [beneficiary]." We reject the assertion that the very act of filing a grant proposal demonstrates extraordinary ability. Counsel states "[a] review of the proposals will exhibit to the examiner that the work of the beneficiary is of an extraordinary level." The grant proposals are prepared by the beneficiary and his associates, and thus they do not reflect the beneficiary's reputation in the field as a whole. Furthermore, the goals stated on the research proposals are not evidence of sustained acclaim or extraordinary ability. By their very nature, grant proposals discuss planned future work, rather than documented past achievements, and the beneficiary does not set himself above his peers merely by planning to accomplish more than they will.

Counsel states "[t]he reference of one's work by others, and the personal recommendation of colleagues in one's field, sets [the beneficiary] above others." With regard to references by others, one must consider the extent to which other researchers cite an author's work. Citation is common, expected practice in scientific research; the beneficiary's own articles contain dozens of citations, but there is no indication that the beneficiary, in compiling his research, cites only the best-known or most accomplished scholars. More significant is the extent and frequency of such citations. An

article that has been cited 50 or 100 times has had greater impact and influence than an article cited three or five times. While counsel acknowledges the importance of the "reference of one's work by others," the record contains no citation documentation to establish the frequency with which others cite the beneficiary's work. Similarly, while counsel stresses that "the articles published by [the beneficiary] are peer-reviewed articles," the petitioner has not shown that peer review is unusual in the field, rather than the accepted standard. Here again, the evidence must be comparative; the publication of a single article is not an immediate and absolute demonstration of acclaim if the field routinely expects such publications from its researchers.

With regard to "the personal recommendation of colleagues in one's field," the source of the recommendations is a highly relevant consideration. The beneficiary's letters are from the petitioning institution, where he works, and McGill University, where he completed his doctorate. Both institutions are widely renowned, but if the beneficiary's reputation is limited to those two institutions, then he has not achieved national or international acclaim, regardless of the expertise of his employers, collaborators and former professors. Further letters from professors at the petitioning institution, submitted with the response to the notice, reinforce rather than refute this conclusion. The letters discuss what "will" occur once the beneficiary successfully completes research that was underway at the time of writing. Expectations of future outcomes cannot carry the same weight as documented past achievements.

Counsel observes that the beneficiary has recently been invited to speak at a "mini-symposium." The record shows that the organizer and moderator of this event is on the faculty of the petitioning university, continuing a sustained pattern in the evidence of record. The faculty of the petitioning university clearly holds the beneficiary in high regard, but it remains as a matter of law that such esteem is not sufficient to establish eligibility.

The director denied the petition, again setting forth the ten criteria at 8 CFR 204.5(h)(3). The director reviewed the beneficiary's educational and professional background and concluded that the beneficiary has met one of the ten criteria through his authorship of published scholarly articles. The director found that the beneficiary's activities, by and large, "appear to fall within routine institutional practice" rather than demonstrate that the beneficiary stands at the very top of his field.

On appeal, the petitioner submits a brief from counsel, copies of documents already in the record, and a new letter. In the appellate brief, counsel acknowledges the director's finding that the petitioner has met the criterion pertaining to published articles. We note again that only one article appears to have actually been published as of the petition's filing date. The director appears to have misinterpreted the evidence, stating that "articles" by the beneficiary have been published. Furthermore, given the sheer number of articles appearing annually in countless scientific journals, it is untenable to assert that the act of publication inherently elevates an author to the top of the field. One must consider several factors, including the standing of the journals publishing the articles, the extent of the alien's published output and the documented impact of the published articles.[1]

[1] The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of

Professor William Z. Rymer, chair of Rehabilitation Research at the petitioning institution, states that the beneficiary "is an acknowledged authority in the application of systems identification methods for the study of neuromuscular control systems in man." Even if every single professor and department head at the petitioning university were to offer such attestations, such letters would not be direct, first-hand evidence that the beneficiary has earned any significant recognition or acclaim outside of the university. It cannot suffice simply for the petitioner to claim that the beneficiary "is an acknowledged authority." Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Prof. Rymer adds that he has "used [the beneficiary] as an expert reference for submissions to the engineering journal for which I am Editor, *Transactions in Neural Systems and Rehabilitation Engineering*." This statement appears to be directed toward satisfying 8 CFR 204.5(h)(3)(iv), judging the work of others. Prof. Rymer does not indicate that the beneficiary had performed such duties as of the filing date; the initial submission never mentioned that the beneficiary had conducted this activity. Also, here again it surfaces that if the beneficiary has acted as a judge, it is not because of his larger national or international acclaim or recognition as an authority, but because an official of the petitioning university has assigned review duties to him. The director has already stated that not every kind of judging has equal weight. Reviewing manuscripts at the behest of the petitioner does not demonstrate the same acclaim as, for instance, serving on a panel to select the recipients of a national prize, or actually being a top editor at a major journal.

Counsel, noting the director's assertion that some kinds of judging are more routine than others, contends that the director's conclusion "is devoid of any logic" because "[i]n any academic setting, but especially in graduate and doctorate programs, peer review is a critical element in the advancement of any candidate." It is for this very reason, however, that the lowest levels of judging carry negligible weight; every candidate for every degree is "judged" to some extent, and thus such judging is routine rather than extraordinary.

Counsel asserts "[o]nce again, the Service fails to grasp the importance of the research grants received by the beneficiary, as well as the requirements in achieving a research grant." As of the petition's filing date, there was no evidence that the beneficiary had actually received any such grants. Even as late as the response to the request for further evidence, counsel referred only to the beneficiary's filing of applications for such grants. With regard to "the requirements in achieving a research grant," the record contains no objective documentary evidence to set forth those requirements. It cannot suffice simply for counsel to insist that grants are difficult to obtain. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

Furthermore, the petitioner has not shown that a research grant is an award for excellence in the field. To obtain a grant, one prepares an application, explaining the goals of the research and enumerating the resources and personnel needed to conduct that research. It appears that grants are awarded on the strength of the proposal (i.e., future work) rather than the recognized excellence of the grant applicant's past work.

Counsel states that the petitioning university is an establishment with a distinguished reputation, and that the beneficiary has performed in a leading or critical role for the petitioner, thus satisfying 8 CFR 204.5(h)(3)(viii). The distinguished reputation of the petitioner is not in dispute here, but at the time of filing the beneficiary was a postdoctoral research associate, which is among the lowest ranks that one can occupy on the research hierarchy without actually being a student. A postdoctoral position is a temporary training position rather than a career appointment. Plainly, the petitioner is not a leader at the petitioning university. With regard to a critical role, the beneficiary may occupy an important place in a particular research project, but a given project or laboratory is not a distinguished organization or establishment in its own right. The petitioner has not shown that the beneficiary's work is critical at the university level, rather than at the much lower level of one of many projects underway in one of many departments at that university.

The petitioner has amply demonstrated that its faculty and staff hold the beneficiary in high esteem. By statute and regulation, the legal standard for extraordinary ability is not the petitioner's institutional opinion of the beneficiary, but rather sustained national or international acclaim, as established by extensive documentation. The objective documentation in the record shows that the beneficiary has been a productive researcher, but it does not show that the beneficiary stands at the very top of his field or that he has earned sustained acclaim at the national or international level.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor. Review of the record, however, does not establish that the beneficiary as distinguished himself as a researcher to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.